Page

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IN THE

Supreme Court of the United States

No. 70-19

UNITED STATES OF AMERICA, *Appellant,*

v.

WILLIAM R. MARION and SAMUEL C. CRATCH, *Appellees.*

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("Association") is composed of more than 1,000 attorneys who are actively engaged in the practice of criminal law in at least 44 States, Puerto Rico,

the Virgin Islands and the District of Columbia.[1] The day-by-day conduct of their profession involves every stage and facet of the entire process of criminal justice in both State and Federal Courts. With significant and increasing frequency, they are being confronted by problems and questions addressed to unjustified and unreasonable delays in the prosecution of criminal cases, the issue presented in this case.

This case presents the issue of unreasonable and unjustifiable prosecutorial delays in a context, not heretofore expressly decided by this Court—at a time prior to the formal initiation of criminal proceedings.[2] The individuals involved may or may not be aware that their conduct is under investigation or that they may likely or possibly be the subject of formal criminal proceedings. If they do know and consult an attorney, defense counsel must advise such clients of the legal and practical alternatives which are available. If such individuals are not aware that they are the target for ultimate prosecution, but criminal proceedings nevertheless eventuate, defense counsel who ultimately appear are confronted with the problems such as a stale record and unavailable witnesses which those circumstances generate. In either event, this case should elucidate the rules and rationale which will dominate the professional consideration and advice given such persons by defense counsel in criminal cases.

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[1] The Association is filing this Brief as *Amicus Curiae* pursuant to the written consent of all parties as provided in Rule 42(2); the letters of consent have been lodged with the Clerk of this Court.

[2] Hereinafter, "pre-indictment" will refer to such formal initiation, whatever the procedure.

The Association supports the position of Appellees that the judgment below dismissing the indictment should be affirmed.[3] Its position is that unreasonable and unjustified prosecutorial delays, prior as well as subsequent to indictment, are in such fundamental conflict with the preservation of the integrity and effectiveness of the administration of criminal law and of fundamental individual rights that they should be judicially condemned; and that the provisions and purposes of the Fifth and Sixth Amendments to the Constitution sustain and require such condemnation.

STATEMENT OF THE CASE

The only significant and relevant chronology in this case is the following:

1. The conduct with which Appellees were charged occurred between September 3, 1965 and January 19, 1966;

2. The Government was clearly aware of this conduct by late 1966;

3. The conduct received notoriety by press treatment in 1967; but

4. The indictment was not returned until April 21, 1970.

Appellees were charged with having engaged in a fraudulent second mortgage scheme, including inducing home owners to sign deeds of trust and promissory notes on the basis of false promises and representations, altering these notes after they were signed, and

[3] This Brief is addressed solely to the merits; it does not discuss the issue of jurisdiction, but assumes *arguendo* that this Court may consider the merits.

thereafter transferring them to purported holders in due course. The last of the acts charged in the indictment was alleged to have occurred on January 19, 1966.

Prior to December 8, 1966, the Government was clearly aware of Appellees' conduct, for on that date, the Federal Trade Commission issued a complaint against Appellees, alleging that the Commission had reason to believe that certain acts and practices (identical or similar to those alleged in the indictment) engaged in by Appellees were misleading and deceptive under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45; this administrative proceeding resulted in a cease and desist order entered on default on February 6, 1967.[4]

In 1967 the press carried numerous articles purporting to disclose allegedly fraudulent second mortgage schemes such as are embraced by the indictment. On March 30, 1967, the United States Attorney for the District of Columbia received a lengthy official report on the activities of one firm in the second mortgage business (A. 25). In a series of articles in *The Washington Post* commencing on September 30, 1967, the activities of various companies, including that operated by Appellees were discussed (A. 24-28). On October 11, 1967, the *Post* reported that a special grand jury had been sworn in to conduct its own investigation of second mortgage schemes (A. 27); and in October 1967 the United States Attorney was quoted as having said that he expected indictments within two weeks (A. 28). In fact, the grand jury which returned the indictment

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[4] *Allied Enterprises, Inc.*, CCH Trade Reg. Rep. ¶¶ 17,787, 17,849 (1965-1967 Transfer Binder).

against Appellees was sworn in on September 2, 1969, and returned this indictment in April 1970 (*ibid.*).

The indictment charged Appellees with four counts of mail fraud, one count of wire fraud, and fourteen counts of transporting falsely made securities in interstate commerce, all in violation of 18 U.S.C. §§ 2, 1341, 1343 and 2314.

Appellees filed a Motion to Dismiss Indictment for Failure to Afford Speedy Trial. The record below consisted of the motion papers and the colloquy of counsel. According to counsel for the Government, the only explanation for the delay was "that the U. S. Attorney's office at the time was not sufficiently staffed to proceed as expeditiously as Your Honor might have liked for us to proceed" (A. 35). There was at that time a "heavy caseload" in the United States Attorney's Office in general and in particular with respect to fraud cases (*ibid.*). The Court below dismissed the indictment on the ground that "there appears no reason why a three-year delay from 1967 was justified by the necessity of research and examination delving into the various transactions [when] they could have been discovered and handled much, much sooner, certainly probably during the year 1967 or at the latest early 1968" (A. 39). The Court held that the matters were known to the United States Attorney's Office or were common knowledge which that office should have known in early 1967 or in late 1967 at the latest (*ibid.*). So far as prejudice was concerned, the Court held that "by the very nature of this outrageous scheme if the allegations could be believed, the ability to remember, to build up in one's recollection, to produce the necessary defense, is bound to have been

seriously prejudiced by the delay of at least some three years in bringing the prosecution" (*ibid.*). For these reasons holding that "there has been a lack of speedy prosecution in this case," the Court granted the Motion to Dismiss (*ibid.*).

SUMMARY OF ARGUMENT

I.

Preservation of the Integrity and Effectiveness of the Administration of Criminal Justice and Basic Individual Constitutional Rights Requires Judicial Condemnation of Unreasonable and Unjustified Prosecutorial Delays.

A. The Government delays in this case prior to indictment amounted to over four years after the last of the acts which the Government alleges was criminal, over three years and four months after those acts were known to the Government and over approximately three years after they were extensively publicized in the community daily newspapers. These multiple-year Government delays are so extensive as to be clearly unreasonable, unless they are sufficiently justified. In this case, however, the only justification proffered by the Government was its claimed "understaffing." To accept any such Government plea is to elevate Government administrative convenience above Constitutional prescription. In every case the Government can assert it elected to divert its personnel to other cases and to pass over the case at bar until it suited its purposes and expediency to prosecute it. The sole Government justification is thus utterly unacceptable. Accordingly, the delay in this case must be taken as unjustified as well as unreasonably prolonged.

B. Unreasonable and unjustified prosecutorial delays wreak a malignant impact upon the integrity and

effectiveness of the administration of criminal law and upon the ability of the individual to defend himself and to enjoy other individual rights. This is true regardless of whether the delay is before or after indictment.

Reasonable speed in the criminal process has long been a mandate in the common law. It first appears in Magna Carta, and without any intimation that pre-indictment time is distinguishable from post-indictment time. It finds consistent expression in common law decisions condemning continuing criminal action after pre-indictment delays. Where there was no justification for a pre-indictment delay of two years, for example, to permit further proceedings was characterized as "monstrous." *Regina* v. *Robins*, 1 Cox's C.C. 114 (Somerset Winter Assizes, 1844).

This same instinctive aversion to delay at any stage of the entire criminal law process is characteristic of popular and professional opinion to this day, and with excellent reason. Speed is one of the criteria for appraising the integrity and effectiveness of the entire system, speed measured from the date of the alleged offense. Not only the victim of the allegedly criminal conduct but society at large in effect waits to see how promptly and effectively the system of criminal justice can and will act to redress the wrong. If the system reacts with unreasonable and unjustified delays, the inexorable result is deterioration if not destruction of respect for and faith in the law.

Further, delays in the period before indictment impair the ability of the individual to defend himself at any subsequent trial. Particularly when the individual has no idea that he is the subject of investigation and accusation, he will make no effort to obtain the assist-

ance of counsel, memorialize the events which are in issue or otherwise make plans and efforts to maximize his ultimate defense. This is illustrative of the cases in which pre-indictment delay is even more pernicious than post-indictment delay. Even where the individual is aware that he is the subject of Government interest, the passage of time without an indictment confirms in his mind that no criminal action is forthcoming and, again, efforts are not undertaken for his own defense which would surely have been taken had the Government indictment been prompt. Obviously, with the passage of time recollection and testimony fade and evaporate, documents may be lost, and in general the prospects for a fair trial are dimmed if they do not disappear altogether.

Furthermore, the individual is prejudiced by delay in the criminal process, when he has been publicly accused albeit not by indictment, by worry and concern and also by impairment in his personal relations with the consequent curtailment of his individual rights such as the right of association. Because of these malignant consequences, unjustified and unreasonable prosecutorial delays in the period before as well as that after an indictment should be judicially proscribed.

II.

Preclusion of Unreasonable and Unjustified Preindictment Prosecutorial Delays Best Serves the Purposes and Provisions of the Fifth and Sixth Amendments.

A. In Constitutional adjudications on criminal procedure, there is a concept of fair trial which embraces rights deemed so fundamental that they are accorded individuals without regard to a showing of actual prejudice in the particular case. For the rea-

sons demonstrated in "I" above, the right to be free of unreasonable and unjustified prosecutorial delays is such a right. Accordingly, it should be judicially proscribed without requiring a showing of actual prejudice. If such a showing is to be required, however, it has been made on this record. Appellees' ability to defend themselves has been so impaired that the District Court was correct in dismissing the indictment.

The statutes of limitations are irrelevant to Constitutional considerations. The Framers intended to provide safeguards for individual rights as against all Government intervention or invasion; they intended no special exemption on the ground of statutory limitation from judicial enforcement of fundamental individual rights.

B. The purposes and provisions of the Fifth Amendment Due Process Clause are best served by preclusion of unreasonable and unjustified pre-indictment prosecutorial delays. Such delays cannot be harmonized with the concepts of fair trial and fair procedures embodied in the Clause.

C. The purposes and provisions of the Sixth Amendment Speedy Trial Clause are likewise best served by preclusion of unreasonable and unjustified pre-indictment prosecutorial delays. The Sixth Amendment consists entirely of rights deemed the most fundamental by the Framers; had they been content to leave these rights in the same status as other rights within the circumference of the concept of Due Process of Law, they would not have taken pains to add to the Constitution a Sixth Amendment which specified only certain specially selected rights.

On the face of the Sixth Amendment, each of the enumerated rights has equal status. No requirement

that a defendant make a showing of prejudice is imposed for the other Sixth Amendment rights. The right to a speedy trial, to be free of unreasonable and unjustified prosecutorial delays before as well as after indictment, stands on no lesser footing than any of the other rights; and, accordingly, no showing of actual prejudice should be exacted as a condition precedent for its enforcement.

The right to a speedy trial does indeed accrue prior to formal indictment. This was the holding as to the right to the assistance of counsel in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and that principle is applicable throughout the rights ensconced in the Sixth Amendment. Furthermore, history teaches that the concept of speedy trial embraced the pre-indictment period. At the common law of England the normal method of criminal prosecution was by private litigation and the common law decisions, as noted above, consistently condemned pre-indictment delays; and for the same reasons reflected in the dismissal of this indictment by the District Court.

ARGUMENT

I.

PRESERVATION OF THE INTEGRITY AND EFFECTIVENESS OF THE ADMINISTRATION OF CRIMINAL JUSTICE AND BASIC INDIVIDUAL CONSTITUTIONAL RIGHTS REQUIRES JUDICIAL CONDEMNATION OF UNREASONABLE AND UNJUSTIFIED PROSECUTORIAL DELAYS.

A. This Case Involves Unreasonable and Unjustified Prosecutorial Delays.

As the foregoing Statement reveals, this case involves delays on the part of the prosecution so extensive as clearly to be unreasonable in the absence of justification—(1) over four years between the last allegedly criminal act and the return of the indictment;

(2) over three years and four months between clear Government awareness of Appellees' conduct and the institution of an administrative proceeding against them and the indictment; and (3) approximately three years between the time that press articles made the alleged offenses a matter of common knowledge in the community and the indictment.

The only justification proffered by the Government for its protracted delays was that it had decided not to assign this case timely to the staff it had, a decision which the Government termed "understaffing." For its own administrative purposes the Government turned its staff away from this case for the extended periods of time shown on this record.

To accept any such Government plea is to subvert the fundamental values represented by the Speedy Trial Constitutional mandate. For the Government would always have this plea at hand; whenever challenged it could plead that the delay was caused by its having diverted its personnel to other matters. But the very concept of speedy trial is to preclude such absolute Government control over the scheduling of the reach of Government criminal law into private lives. To permit the Government to time its charges and trials to suit its own expediencies and purposes favors tyranny rather than democracy.

The very purpose of the fundamental rights ensconced in the Bill of Rights, including those related to fair and speedy trial, is to immunize individual rights from Government abuse and invasion. Certainly the Government cannot escape from the Constitutionally specified restrictions on Government which are the hallmarks of American Democracy simply by pleading

its own administrative choice and convenience in a particular case. Beyond doubt, therefore, the delays in this case must be considered unjustified as well as unreasonably prolonged.

Such delays, we demonstrate in Point I, should be proscribed by the Court because of their malignant impact upon (1) the administration of criminal justice, (2) the ability of the individual to defend himself at any trial, and (3) other basic individual Constitutional rights. In Point II, we will demonstrate that these evils are to be condemned under the purposes and provisions of both the Due Process Clause of the Fifth Amendment and the Speedy Trial Clause of the Sixth Amendment and the concept of fair trial which they embody. In our view, when a Court finds that the Government has in fact engaged in unreasonable and unjustified prosecutorial delays, the indictment must be dismissed (or the conviction reversed). The defendant should not be required to show actual prejudice any more than he does to be accorded any other fundamental Constitutional right, but if some showing of prejudice is to be imposed, the requirement is amply satisfied upon the facts of this record.

B. Unreasonable and Unjustified Prosecutorial Delays Have a Malignant Impact upon the Integrity and Effectiveness of the Administration of Criminal Justice and Basic Individual Constitutional Rights.

1. The administration of criminal justice.

Delay of itself is antagonistic to the Constitutional rights of the individual who is the object of the Governmental action. "Stale claims have never been favored by the law, and far less so in criminal cases." *Dickey* v. *Florida,* 398 U.S. 30, 37 (1970). "Justice delayed is justice denied" has long been and remains

a maxim which is at once a beacon to the law in theory and an indictment of the law in practice.[5] This instinctively felt abhorrence of delay in the administration of justice is directed at delay at any stage of the entire process, from the event or events which give rise to the subsequent legal proceeding to the ultimate conclusion of that proceeding. It does not welcome or excuse delay at any stage of the process, whether before or after indictment or at any other particular signpost along the entire way.

a. *Common Law Decisions Condemning Pre-Indictment Delay.*

Almost eight centuries ago this aversion to delay found expression as an individual right to receive prompt treatment at the hands of the law. "That right has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), wherein it was written, 'We will sell to no man, we will not deny or defer to any man either justice or right' * * *." *Klopfer* v. *North Carolina,* 386 U.S. 213, 223 (1967). In neither the text of the Magna Carta nor Coke's commentaries thereon is any distinction drawn because of the stage of the process in which delay or denial of right of justice occurs. *Id.* at 224. The significance of this great prescription of

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[5] The Latin equivalent of this maxim evidently derives from Coke, *The Second Part of the Institutes of the Laws of England,* 55 (Brooke, 5th ed., 1797). *Klopfer* v. *North Carolina,* 386 U.S. 213, 224, n. 14 (1967). The English version is commonly credited to Gladstone. Eckler, *Historical Review: Lagging Justice,* Annals of the American Academy of Political and Social Sciences, Vol. 328, p. 6 (Philadelphia 1960).

right was that justice must have three qualities, that it be free, full and swift. *Id.* at n. 14.

This guarantee of individual rights was reflected in the common law in the special arena of the criminal law pitted against the individual citizen, and with respect particularly to unreasonable and unjustified delays prior to the commencement of criminal proceedings. One of the very earliest statements was the declaration by Lord Mansfield in *Rex* v. *Robinson,* 1 Black. W. 541, 96 Eng. Rep. 313, a decision rendered in 1765 and thus antedating the Declaration of Independence. Lord Mansfield there refused a motion for a criminal information against the defendant, *inter alia,* on the ground that over two years had expired since the offense and "the delay is not accounted for." *Id.* at 542, 314. In *Rex* v. *Marshal and Grantham,* 13 East 322, 104 Eng. Rep. 394 (1811), furthermore, the Court refused to entertain an application to proceed with criminal prosecution prior to indictment "because it was made so late in the second term that the magistrates would have no opportunity of shewing cause in the present term against a rule nisi for an information, if granted." *Ibid.* Identically, *Regina* v. *Hext,* 4 Jurist 339 (1840), held that a rule for a criminal information would not be granted where a whole term had been allowed to intervene between the alleged offense and the application to the jurisdiction of the Court. The applicant there sought to justify the lapse of time between the alleged offense and the application by his efforts to settle the case. But the holding was that the application was required "to have been more prompt."

The classic common law statement is that of Baron Alderson in *Regina* v. *Robins,* 1 Cox's C.C. 114 (Somer-

set Winter Assizes, 1844), which "is an example of an English court applying a standard of fundamental fairness when charges were not preferred for more than two years." *Nickens* v. *United States*, 323 F. 2d 808, 810, n. 2 (D.C. Cir. 1963), *cert. denied*, 379 U.S. 905 (1964). There was no satisfactory explanation of the cause of the delay. Baron Alderson directed the jury to acquit defendant, holding, "I ought not to allow this case to go further. *It is monstrous to put a man on his trial after such a lapse of time.*"[6] The entire idea violated the Court's instinctive sense of justice.

Although that decision was rendered after the United States of America became a separate nation, it conformed to the common law as it had existed for centuries and thus at the time of Independence. *Robins* and the other decisions of identical purport are the best statements of the decisional and intuitive stand of the common law against unreasonable and unjustified prosecutorial delays at any stage of the entire administration of criminal law.

b. *Reasons for Aversion To Delay Even More Forceful Today.*

The fundamental reasons for this instinctive antagonism to delay are inherent in human nature and remain dominant today. It appears self-evident, for example, that the closer in time which the criminal law activates itself in relation to the alleged offense, the greater the popular and professional faith and trust in the entire

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[6] Emphasis is added here and throughout this Brief and footnotes in quotations are omitted, unless otherwise specified.

process of criminal administration.[7] What "is indispensable to command the respect and confidence of the community in applications of the criminal law" is a compelling factor in Constitutional adjudication. *In Re Winship,* 397 U.S. 358, 364 (1970).

Most dramatically from the viewpoint of the victim of the alleged criminal conduct, there is need for prompt as well as effective criminal action if that faith and respect is to be sustained. From the viewpoint of the public at large, when there has been some public accusation in the press or other media, as there was in this case, and particularly when that publicity includes the statements by the prosecutorial arms or even other branches of the Government, as there were in this case, any prolonged lapse of time without any criminal proceedings being undertaken signifies a breakdown or indifference of the entire Governmental machinery for criminal justice. To the public view, extended delay prior to indictment denotes a greater default of the desired "law and order" than a delay after indictment, for with indictment the public can at least see that the prosecutor has done something.

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[7] The Attorney General has frequently called attention to "slow justice" and the pressing fact "that the American public is concerned about its system of justice—while confidence in that system is indispensable to an ordered society"—most recently before the American Bar Association at London. Department of Justice, Press Release, July 16, 1971, "In Quest of Speedy Justice", Address of the Attorney General of the United States, pp. 7, 3. On January 5, 1971, the Second Circuit promulgated Rules Regarding Prompt Disposition of Criminal Cases. The accompanying Statement to the Circuit Council declared (p. 7), "The general observance of law rests largely upon a respect for the process of law enforcement. When the process is slowed down by repeated delays in the disposition of charges for which there is no good reason, public confidence is seriously eroded."

The preachment and promise of the criminal law is that the commission of a crime will generate swift, successful and fair Governmental action at every stage of the process, investigation, arrest, arraignment, trial, sentence, and correction and rehabilitation. Unreasonable and unjustified delay is disillusioning, is violative of society's preachment and promise, identically whether it occurs prior or subsequent to indictment. Any such delay pollutes the administration of criminal justice, without regard to the causes, if any, which the citizen speculates or assumes for it. The popular response which would be most favorable to the criminal law is that the prosecutorial officials are acting in complete good faith—that they are, for example, diligent and efficient but overwhelmed by the case load. More destructive of the effectiveness of criminal law would be the assumption that the prosecutorial officials are not evil or corrupt but are only indifferent or negligent. Given the temper of the times, however, the popular assumption may well be that the delay is not inadvertent, but by prosecutorial design, immediately generating the further assumption that there is some impropriety, some unsavory "deal", which is the covert but true cause. Whatever the cause assigned by the public in general, delay breeds distrust, resentment and frustration, and thus infects and destroys the integrity and effectiveness of the entire criminal law process.

Moreover, it is popular knowledge and virtually a truism that delay of itself, whenever it occurs, adversely affects the trial and indeed may make trial impossible or difficult for one side or the other. Most obviously, witnesses may become unavailable with the passage of time. Witnesses may die, move beyond the jurisdiction, be ill or otherwise unreachable by sub-

poena or persuasion. For those witnesses who are available, as well as the parties and potential witnesses, the sheer onward march of time erodes the breadth and accuracy of memory. It may indeed move evidentiary recollection of the events in issue beyond the pale of confident and accurate memory. Nor are actual and potential witnesses the only source of evidence which may erode by the simple passage of time whenever that occurs. With delay there is an enhanced possibility of loss or damage to documentary and other evidence.

While these deleterious results of delay have been true for centuries since they inhere in the nature of man, they are magnified and intensified by the increasing complexity and variety of modern life. The sheer numbers of occurrences and distractions of attention and accurate observation are being multiplied by such factors as the onset of technological advance and the population explosion. They create new and fortify old barriers to accurate observation, memory and recounting. They enhance the inevitable prejudice against fair and realistic trial engendered by delay. All these factors of course work just as profoundly and pervasively if the delay is prior rather than subsequent to indictment.

2. The ability of the individual to defend himself at any trial.

The general evils that inhere in delay are displayed most poignantly in the impairment of the individual's right to defend himself at any trial. As this Court has held, one of the very "basic demands of criminal justice in the Anglo-American legal system" is " 'to limit the possibilities that long delay will impair the ability of an accused to defend himself.' " *Smith* v. *Hooey,* 393 U.S. 374, 378 (1969), reiterating *United States* v.

Ewell, 383 U.S. 116, 120 (1966). Manifestly, delay inflicts this injury because " 'evidence and witnesses disappear, memories fade, and events lose their perspective' * * *." *Smith* v. *Hooey, supra,* at 380, citing Note, *Effective Guarantee of a Speedy Trial for Convicts in Other Jurisdictions,* 77 Yale L.J. 767, 769 (1968). These "erosive effects of the passage of time", *Smith* v. *Hooey, loc. cit. supra,* are the product of delay *per se.* Manifestly, they are identical whether that delay is before or after the formal commencement of criminal proceedings.[8]

A delay of 22 months without satisfactory explanation in the pre-indictment period was held to prejudice and even preclude any effective defense, in *Regina* v.

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[8] The Government concedes that the ultimate ability to present the defense at trial "may of course be affected by the passage of time before, as well as after indictment or arrest." Gov. Br. 19. While this evil impact of pre-indictment delay of course does not depend on when the Government has sufficient evidence to move against a suspect, *ibid.*, the significance of that time is that thereafter all delay is fairly to be chargeable to the Government. From that time the question runs as to whether the delay was unreasonable in its duration and if so whether the prolonged delay was unjustified.

In emphasizing that its assignment of greater resources to the particular case would in practice result in an earlier indictment and arrest, *id.* at 19-20, and in suggesting that the recognition that the Sixth Amendment embraces preindictment delays might "encourage expediency on the part of prosecutors and discourage thoroughness," *id.* at 21, the Government unwittingly emphasizes the realistic imperative of considering the entire criminal law process in a particular case as one integrated continuum not truly capable of subdivision into independent pre- and post-indictment legal categories. The Government obviously views its speed of performance as integrated and interrelated throughout the entire process. At all stages, whether before or after indictment, the Government is transparently in control of the timing of the process for its own purposes.

Robins, 1 Cox's C.C. 114 (Somerset Winter Assizes, 1844): "How can he [the defendant] account for his conduct so far back? If you accuse a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at the time; but if the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial."

In many circumstances, delay prior to indictment infringes the individual's ability to defend himself even more than delay after indictment.[9] This is most obvious in the case of the individual who has no knowledge that he is the object of prosecutorial attention. He has no reason to consult an attorney or make any effort to sharpen his recollection, obtain witnesses,

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[9] "Surely it is evident that the prejudice to his defense which a defendant suffers due to post-arrest delay is indistinguishable from that which pre-arrest delay may occasion. * * * Witnesses become inaccessible and memories are dulled regardless of how the delay is labeled. *Indeed, the uncharged defendant who suffers pre-arrest delay may be at an even greater disadvantage than the charged defendant who endures post-arrest delay.* The charged defendant is at least on notice that a criminal prosecution has been instituted against him and he can marshal evidence and build a defense with the assistance of counsel during the delay period. In contrast, the uncharged defendant is typically unaware that the police are ready to arrest and prosecute him at some future time. He is thus foreclosed from taking any action to forestall the eroding effect that substantial delay between the alleged offense and arrest will most likely have on his ability to prepare and prove a defense." Note, *Pre-Arrest Delay: Evolving Due Process Standards,* 43 N.Y.U. L.Rev. 722, 725 (1968). See also Note, *The Right to a Speedy Trial,* 20 Stan. L.Rev. 476, 489 (1968); Note, *Justice Overdue: Speedy Trial for the Potential Defendant,* 5 Stan. L.Rev. 95, 100 (1952).

maintain records, or otherwise safeguard testimony or take actions favorable to his defense. Even if he should know that he is the object of prosecutorial attention, he may lack the resources to employ counsel both before and after indictment; or may otherwise decide or not be in a position to obtain the advice of counsel or otherwise to take the measures on his own behalf which he would take upon the knowledge that he was indeed involved in a criminal trial. The human tendency to hope for the best, to believe that it cannot happen to me, to avoid the unpleasant and difficult until some cold actuality rather than possibility imposes its pressures from the outside, all militate against the individual's taking the same actions to prepare a real defense prior to indictment as he would perforce take upon indictment.

Delay in indictment also prejudices the defendant and benefits the Government by postponing whatever right of discovery the defendant may have. The Government would hardly concede that any obligations it would acknowledge under such decisions as *Brady* v. *Maryland,* 373 U.S. 83 (1963), or Rule 16, Federal Rules of Criminal Procedure, commence prior to indictment. Obviously, whatever facts are forthcoming by virtue of discovery will likely lead to other avenues of factual exploration; but delay may close or cool those avenues to the defendant. These factors work against the individual during the pre-indictment period but are manifestly not operative after the indictment. Accordingly, the severe prejudice to the ability of the individual to defend himself in any subsequent criminal trial produced by unreasonable and unjustified Government pre-indictment delay is an eloquent advocate for dismissal of the indictment.

3. Invasion of other individual rights.

The prejudice to the individual's ability to defend himself should a trial eventuate is not the only impairment of individual rights wreaked by delay, whether before or after indictment. It is also one of the "basic demands of criminal justice in the Anglo-American legal system: * * * to minimize anxiety and concern accompanying public accusation * * *.'" *Smith* v. *Hooey*, 393 U.S. 374, 378 (1969), citing *United States* v. *Ewell*, 383 U.S. 116, 120 (1966). While the "public accusation" in *Smith* and *Ewell* took the form of a formal indictment, the impact is no less real when the accusing voice is that of a Government agency and also that of newspaper articles, and particularly press statements quoting the public prosecutor. Those surely are public accusations in the eyes of the world and they must therefore be the same in the eyes of the law.[10]

Human experience—the life of the law—declares in no uncertain terms that the individual who has been made the target of this public and Governmental albeit not formally prosecutorial accusation suffers within himself. His physical and mental state and health will necessarily be affected. In addition to his subjective worries and concerns, such public accusations will inevitably bring some burden or even break in the

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[10] Reality thus refutes the Government's easy assertion that this safeguard of the Sixth Amendment is "usually not pertinent when the delay occurs before indictment or arrest. The defendant * * * has not yet been charged with a crime." Gov. Br. 18. The Government does admit awareness of the newspaper articles but asserts they attributed no allegation of wrongdoing to the United States Attorney and "no official statements of any kind had charged them with criminal activities." *Id.* at 19, n. 11. That is unrealistic; see Statement of the Case, *supra*, at 4.

accused's relationship to others—to family, occupation, reputation and community standing. In the human reality reflected in the law, a charge of wrongdoing made in the press is "an outstanding untried charge" which must inevitably have a "depressive * * * effect * * *." *Smith* v. *Hooey,* 393 U.S. 374, 379 (1969). The pendency of this public charge against the accused in the absence of an indictment, no less than the pendency of an indictment, "may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participations in unpopular causes." *Klopfer* v. *North Carolina,* 386 U.S. 213, 222 (1967). There should be no "prolonging [of] this oppression * * *." *Ibid.*

II.

PRECLUSION OF UNREASONABLE AND UNJUSTIFIED PRE-INDICTMENT PROSECUTORIAL DELAYS BEST SERVES THE PURPOSES AND PROVISIONS OF THE FIFTH AND SIXTH AMENDMENTS.

A. The Concept of Fair Trial Reflected in Both the Due Process and Speedy Trial Clauses Requires Dismissal of Indictments Brought by the Government After Unreasonable and Unjustified Delays.

1. Such dismissal should be required as a matter of absolute Constitutional right, without imposing upon the individual any burden of showing actual prejudice.

Beyond doubt, there is a fundamental concept of "fair trial" which embodies certain minimum procedural safeguards guaranteed every individual subject to the criminal process as a matter of absolute right. When this concept is at the forefront of decision, the issue is whether the particular standard has been violated. To reverse a conviction or dismiss an indictment, the defendant need not undertake any showing

of prejudice; the only showing required is deprivation of some procedural right essential to a fair trial. While the particular legal rubric varies, the constant principle is that the particular requirement of law is recognized as requiring enforcement for its own sake. Its contribution to the concept of "fair trial" is deemed so important that actual prejudice in the individual case is either irrelevant or presumed.

This Court did not require any showing of prejudice, for example, in reversing a conviction when women had been systematically excluded from the jury. "To insulate the courtroom from either [sex] *may not in a given case make an iota of difference.* Yet a flavor, a distinct quality is lost if either sex is excluded. * * * The point illustrates that the exclusion of women from jury panels *may at times be highly prejudicial* to the defendants. *But reversible error does not depend on a showing of prejudice in an individual case.*" *Ballard* v. *United States,* 329 U.S. 187, 194-195 (1946). Similarly, in *Glasser* v. *United States,* 315 U.S. 60, 75-76 (1942), this Court held, "To determine the precise degree of prejudice sustained by Glasser * * * is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[11] And there are many other cases to like effect including those, discussed *infra,* enforcing rights expressly specified in the Sixth Amendment.

The touchstone is not actual prejudice shown in the particular case by the defendant, but probable preju-

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[11] *Glasser* is a case of Constitutional dimension. *Witherspoon* v. *Illinois,* 391 U.S. 510, 518 (1968).

dice established for the generality of cases by the very nature of the Government conduct involved. This Court defined the standard as follows in *Sheppard* v. *Maxwell,* 384 U.S. 333, 352 (1966):

> "Only last Term in *Estes* v. *Texas,* 381 U.S. 532 (1965), we set aside a conviction despite the absence of any showing of prejudice. We said there:
>
> 'It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lack- in due process.' At 542-543."

For " 'our system of law has always endeavored to prevent even the *probability* of unfairness. * * * [T]o perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt* v. *United States,* 348 U.S. 11, 14 [citing *In re Murchison,* 349 U.S. 133, 136]." ' " *Estes* v. *Texas,* 381 U.S. 532, 543 (1965; emphasis in original).

The appearance, the probability and indeed the inevitable actuality of injustice because of unreasonable and unjustified prosecutorial delays are clear by virtue of the previous discussions in this Brief. No doubt because of such injustice the right to a speedy trial has been prized by this Court as "one of the most basic rights preserved by our Constitution." *Klopfer* v. *North Carolina,* 386 U.S. 213, 226 (1967). That status as a basic right should, in the light of the foregoing, inhibit or preclude any requirement that an accused must demonstrate actual prejudice in order to avail himself of this Constitutional right.

Moreover, to impose upon the defendant the requirement of proving actual prejudice is invariably tantamount to predetermining that there is no right to speedy trial unless a known witness has died or a known document has disappeared. But this puts an unfair if not impossible burden upon the accused. After all, for example, "it is almost impossible for a defendant to prove actual prejudice if he cannot remember his activities on the date of the offense."[12] Accordingly, no requirement of prejudice should be imposed, but in faithful adherence to the concept of fair trial, the Court should act in favor of the defendant upon finding that there was in fact an unreasonable and unjustified prosecutorial delay.

2. Assuming that some showing of actual prejudice is required, however, under the circumstances of this case appellees' showing of likely actual prejudice amply supports dismissal of the indictment.

In this case, assuming *arguendo* some showing of prejudice should be exacted from the defendant, there are a multitude of separate transactions and occurrences, and Appellees can scarcely now be expected to

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[12] Note, *The Potential Defendant's Right to a Speedy Trial*, 48 N.Car. L.Rev. 121, 127 (1969). "In a very real sense, the extent to which [the defendant] was prejudiced by the Government's delay is evidenced by the difficulty he encountered in establishing with particularity the elements of that prejudice." *Ross* v. *United States*, 349 F.2d 210, 215 (D.C.Cir. 1965). "The next stopping point, and perhaps the most reasonable one, is the time at which the police have enough evidence to give reasonable assurance of conviction. Delay in bringing charges after this point, unless the other justifying circumstances are present, can reasonably be deemed to be in bad faith—calculated to avoid the constitutional duty to give the defendant a speedy trial." Note, *Effective Guarantee of a Speedy Trial for Convicts in Other* Jurisdictions, 77 Yale L.J. 767, 785 (1968).

remember the conversations and other circumstances surrounding each of them. The fact that documents are involved and that the Government now advises its own case will be based upon documents only serves to emphasize the conclusion that detailed recollection about the circumstances, context and relationship of the documents is essential to the defense; and thus serves to compound the prejudice to the defense because of the failure of such recollections through the passage of time imposed by the Government. Beyond this, as the Government concedes, there is an allegation of wire fraud which the Government acknowledges would have to be proved "through the mouth of the person who supposedly received this telephone call" (A. 34). As to it the evidence patently is not documentary but is subject to the same progressive infirmities in recollection and testimony accruing from delay as is characteristic of any non-documentary criminal case. The Government attempts to derogate the prejudice by citing various related civil cases, which hardly have the same legal or factual boundaries as the criminal prosecution in any event, without recalling that almost all of them have been settled without trial.[13] Appellees were under no necessity to engage in particularized reconstruction or conservation of the past occurrences or evidence or in any element-by-element, day-by-day, trial preparation and presentation of a defense. They certainly were under no such necessity as to any criminal case because the unreasonable and unjustified Government delay signified that there would be no indictment and *a fortiori* no trial. The Government thus prejudiced the defense. That prejudice supports dismissal of the indictment on Due Process grounds.

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[13] Gov. Br. 7-8, n. 2.

3. The statutes of limitations are irrelevant to Constitutional considerations.

Despite the factor of prejudice, an argument might be fashioned, as it has been by the Government, Gov. Br. II, 22-28, that there is no role for judicial decision under Due Process or other Constitutional considerations in pre-indictment delay cases, so long as the indictment is brought within the applicable statute of limitations. But the predicate of this position, that the parameters of the statute of limitations and of the Due Process Clause are identical in this context, finds no support in history or law.

As a historical matter, Congress adopted the Bill of Rights for submission to the States in 1789—*before* it had enacted any statutes of limitations. Congress could not possibly have been according non-existent statutes with any capacity to affect, let alone to attain equal status with, the Bill of Rights. The first such statute was enacted the *following* year. Gov. Br. 24. It was a general provision of a *two-year* limitations period. *Ibid.* If history permits any inference, it is that the Framers would have approved of the judgment below.

Even in the Government view of the law there is some necessary and proper role for judicial scrutiny within the limitations period, for example, when the delay has exceptionally prejudiced the defendant or the purpose of the prosecution's delay is to impair the ability to defend. Gov. Br. 26-27. Moreover, to contend that only the legislature may regulate or adjudicate pre-indictment delays is to acknowledge that the legislature could enact limitations periods of double or triple their present lengths, without any Constitutional inhibition. The Framers who were safeguard-

ing rights to the accused in the Fifth and Sixth Amendments hardly intended to leave those rights to the legislative power without any reference to the Constitutional prescription enforceable in the Courts.[14] In short, analysis reveals that "statutes of limitations merely represent the maximum period beyond which a prosecution cannot be brought, and do not preclude judicial inquiry into the constitutionality of delays within that period." [15]

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[14] "It is difficult to explain how the existence of a statute of limitation could possibly foreclose a constitutional right. To the contrary, the sixth amendment is necessary to preserve the minimum rights of a speedy trial since a statute of limitation can be extended or contracted by a legislature. A statute of limitation sets an arbitrary limit for prosecution that does not attempt to discriminate between necessary and unnecessary delay, whereas the right to a speedy trial is founded precisely on such distinctions. To the extent that a statute of limitation bars prosecution on aged and untrustworthy evidence it overlaps with the right to speedy trial, but the decision of the legislature to set an outer bound on delay of all kinds can hardly supplant a bound on particular types of delay which may be stricter but which proceeds from a higher source." Note, *The Lagging Right to a Speedy Trial,* 51 U.Va. L.Rev. 1587, 1614 (1965).

[15] Note, *The Right to a Speedy Trial,* 20 Stan. L.Rev. 476, 492 (1968). The position that the Courts should dismiss indictments culminating from unreasonable and unjustified pre-indictment delay is necessarily predicated upon knowledge by the Government of the facts upon which the indictment could be brought, knowledge which is amply displayed on the instant record. Should the Government in fact not have knowledge, the considerations we have been espousing do not attach. Even in such a case, if the Government comes to the knowledge too late to file an indictment within the statute of limitations, criminal prosecution is forever barred. Thus the statute of limitations imposes a terminal restriction upon the prosecution even when the delay has been justified and reasonable. *A fortiori,* the statute of limitations does not preclude the judicial imposition of some shorter time period based upon Due Process considerations. *Cf.* e.g., *Petition of Provoo,* 17 F.R.D. 183 (D.Md. 1955), *aff'd sub nom. United States* v. *Provoo,* 350 U.S. 857 (1955).

B. The Purposes and Provisions of the Fifth Amendment Due Process Clause Are Best Served by Preclusion of Unreasonable and Unjustified Pre-Indictment Prosecutorial Delays.

If the Court should find it necessary or desirable to categorize this case and considers it as Due Process rather than as Speedy Trial or as fair trial combining if not transcending both the Due Process and Speedy Trial categories, the foregoing discussion demonstrates that toleration of prosecutorial action which has been unreasonably and unjustifiably delayed does indeed offend the purposes and provisions of the Fifth Amendment requirement of Due Process of Law. See, e.g., *Ross* v. *United States,* 349 F. 2d 210 (D.C. Cir. 1965). In sum, Due Process is a general guarantee of fair trial and such delays are utterly inconsistent with fair trial.

C. The Purposes and Provisions of the Sixth Amendment Speedy Trial Clause Are Best Served by Preclusion of Unreasonable and Unjustified Pre-Indictment Prosecutorial Delays.

1. The context and structure of the Sixth Amendment demonstrate the special status of each of the rights specified therein.

a. *That Certain Elements of Fair Trial and Due Process Were Specified in the Sixth Amendment Signifies Their Special Status.*

Inasmuch as the Fifth Amendment Due Process Clause may be interpreted as embracing all of the fundamental elements of fair trial, as suggested above, the reiteration of certain elements in the Sixth Amendment (or elsewhere in the Constitution) was plainly for the purpose of emphasis. The great purpose of the Sixth Amendment certainly was not to

diminish the ambit of the concept of fair trial or the Fifth Amendment Due Process Clause but to compound the certainty, a necessity in human though not logical terms, that each of the rights specified in the Sixth Amendment would be enforced scrupulously. "The fact that [a] right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that [it] was a fundamental right essential to a fair trial in a criminal prosecution." *Pointer* v. *Texas,* 380 U.S. 400, 404 (1965).

b. *The Text of the Sixth Amendment Demonstrates the Equal Standing of Each of the Enumerated Rights in Relation to the Others.*

The plain text of the Sixth Amendment accords identical stature to each of the rights enumerated therein. Indeed, the Sixth Amendment is but a single sentence, a listing of separate rights each of which is guaranteed to the accused in all criminal prosecutions. As the text is one of guaranty, there is not the slightest justification in relation to any of the specified rights for requiring the accused to make any showing of prejudice to receive what the Constitutional language grants to each and all persons.

A fortiori, on the face of the Amendment there is not the slightest justification for requiring any showing of prejudice to obtain the full benefit of the Speedy Trial Clause if in practice no such showing is required with respect to any of the other clauses. And, indeed, no such showing is required. See, e.g., *In Re Oliver,* 333 U.S. 257, 266-273 (1948) (right to a public trial; this right is a "guarantee to an accused" and its foundation is the public interest involved rather than

the benefit or prejudice to the defendant, *id.* at 270); *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968), *Duncan* v. *Louisiana,* 391 U.S. 145 (1968) (right to an impartial jury); *Pointer* v. *Texas,* 380 U.S. 400 (1965) (confrontation); *Washington* v. *Texas,* 388 U.S. 14 (1967) (compulsory process); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), *Johnson* v. *Zerbst,* 304 U.S. 458 (1938) (right to counsel); Note, *The Right to a Speedy Trial,* 20 Stan. L.Rev. 476, 494-495, n. 131 (1968).

To focus on one case for purposes of illustration, the decision in *Washington* v. *Texas, supra,* considered two questions, the applicability of the right of confrontation and whether it had been violated. Upon consideration of decisions holding that the other elements of fair trial specified in the Sixth Amendment were applicable to the States, the Court held, "The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States." *Id.* at 18. The other question in the case was framed by the Court as follows: "Since the right to compulsory process is applicable in this state proceeding, the question remains whether it was violated in the circumstances of this case." *Id.* at 19. With the finding that it was violated, the conviction was reversed. There was no intimation of any requirement of showing of actual prejudice by the defendant.

Pari passu, the unreasonable and unjustified prosecutorial delay found by the Court here requires affirmance of the dismissal of the indictment. Certainly the right to a speedy trial "stands on no lesser footing than the other Sixth Amendment rights"; indeed, as we have seen, this Court has expressly held that "the

right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment." *Klopfer* v. *North Carolina,* 386 U.S. 213, 223 (1967). "The speedy-trial safeguard is premised upon the reality that fundamental unfairness is likely in overlong prosecutions. * * * When the Sixth Amendment right to speedy trial is at stake, it may be equally realistic and necessary to assume prejudice once the accused shows that he was denied a rapid prosecution." *Dickey* v. *Florida,* 398 U.S. 30, 54-55 (1970) (concurring opinion).

2. The Sixth Amendment rights apply when the Government has focused on the accused; and surely for speedy trial purposes when the Government has reasonable knowledge of the facts it asserts as criminal violation.

The short answer to any contention that the language of the Speedy Trial Clause must or should be interpreted as embracing only the post-indictment period and excluding the pre-indictment period, Gov. Br. 15-16, is that this Court has squarely held that the right "to have the Assistance of Counsel for his defense," which stands on no different footing from any of the other rights enumerated in the Sixth Amendment including that to a Speedy Trial, is indeed enforceable prior to indictment. *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), ruled that the Sixth Amendment right of counsel was applicable to the interrogation there conducted by the police—even though the Court expressly recognized that the interrogation "was conducted before petitioner was formally indicted. But in the context of this case, that fact should make no difference." *Id.* at 485. The touchstone defined by the Court as to when the protections of the Sixth Amendment attach to one as an "accused" was whether "the investigation is no longer a general inquiry into an unsolved crime

but has begun to focus on a particular suspect * * * ." *Id.* at 490. The Court's holding was "only that when the process shifts from investigatory to accusatory—when its focus is on the accused * * *" the Sixth Amendment rights and protections are available; and any subsequent prosecutorial action flowing from the deprivation of any of those rights would be reversed. *Id.* at 492.[16] It is probative that the Government assays no genuine response to this direct holding in Escobedo.[17]

Moreover, this Court approved the inclusion of the time before as well as after indictment in its affirmance, 350 U.S. 857 (1955), in *Petition of Provoo*, 17 F.R.D. 183, 202-203 (D. Md. 1955). This Court affirmed the District Court's holding "that Provoo cannot have a fair trial at this late date, that he has been denied the right of speedy trial within the meaning of the Sixth Amendment, and that there have been *unnecessary delays in indicting him* and bringing him to trial." *Id.* at 203.

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[16] *Cf. United States* v. *Dickerson*, 413 F.2d 1111 (7th Cir. 1969); *United States* v. *Casias*, 306 F. Supp. 166 (D.Colo. 1969); *United States* v. *Wainwright*, 284 F. Supp. 129 (D.Colo. 1968); *United States* v. *Turzynski*, 268 F. Supp. 847 (N.D.Ill. 1967); *but see United States* v. *Jaskiewicz*, 433 F.2d 415 (3rd Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971); and cases cited therein.

[17] The only reference to *Escobedo* in the entire discussion of the Sixth Amendment, Gov. Br. "II" 15-22, or in the entire Brief for that matter, is in the context of flaying the straw man issue that Appellees' position here is the same as that taken by another party citing *Escobedo* (*id.* at 20). The holding in that other case, as cited by the Government, has nothing to do with our position in this case. We are not asserting that the Government violates the Constitution if it acts "too soon", which is all that was rejected in *Hoffa* v. *United States*, 385 U.S. 293, 309-310 (1966)—"There is no constitutional right to be arrested"—although we do urge that the Government is under the Sixth Amendment mandate not to "wait too long." That is certainly the law.

3. The historical context of the Speedy Trial Clause affirms its applicability in the pre-indictment period.

Assuming that the issue were one of first impression, it would appear to hinge on the general meaning which the Framers of the Sixth Amendment meant to put on the words "criminal prosecution" and "accused".[18] The critical historical fact is that at that time criminal prosecution at the common law was in general commenced in a completely different way from that with which we are familiar today. "By the common law of England which was brought to America by the colonists, the ordinary criminal prosecution was conducted by a private prosecutor, in the name of the King. In case the victim of the crime, or someone interested, came forward to prosecute, he retained his own counsel and had charge of the case as in an everyday civil proceeding * * *." Dession, *Criminal Law, Administration and Public Order* 356 (1948).[19] Procedurally, the "criminal prosecution" was thus commenced by the filing of a lawsuit, and thereafter the filing of an application for criminal prosecution or rule nisi or similar procedure calling for the defendant to

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[18] Resort to bare language or specific legislative history provides virtually no guidance. "Indeed, if interpreted literally, the guarantee of a speedy trial refers only to delays during the period of time in which the government and the defendant are presenting their cases to the jury." Note, *The Right to a Speedy Trial*, 20 Stan. L.Rev. 476, 491 (1968). But no one contends the word "Speedy" in the Sixth Amendment refers to the duration of the trial rather than the time consumed prior to trial.

[19] "It is significant that private prosecution is still one of the principal bases for criminal administration in Great Britain." Schwartz, *Case and Materials on Professional Responsibility and the Administration of Criminal Justice* 4 (The National Council on Legal Clinics, American Bar Center, 1961); 1 Stephen, *A History of the Criminal Law of England* 493-501 (1883).

show cause why he should not be imprisoned. In general historical fact, therefore, the English common law with which the Framers were familiar conceived of a "criminal prosecution" as being commenced prior to indictment, and thus that the individual charged as the defendant in a criminal proceeding could and would be an "accused" prior to formal indictment.[20] The com-

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[20] It betrays the bedrock aspirations of the Framers to establish a better society for the future to contend, as the Government does, Gov. Br. 16-17, that in providing for Speedy Trial the Framers wore such blinders they could see only the English Habeas Corpus Act of 1679 and a Latin maxim, *nullum tempus occurrit regi*. It rewrites history to represent that those who adopted the Sixth Amendment had no intention of providing any new, more enlightened personal rights than those already provided by the English or any other legal system.

There is no basis for the Government's equation of the reach of the Sixth Amendment with that of The English Habeas Corpus Act of 1679. Gov. Br. 16-17. The Act embraced no general concept of "Speedy Trial" applicable to all crimes, but for felonies specified a particular time in terms of terms of the Court; the Sixth Amendment, contrastingly, applies to all crimes and establishes no special time but the general mandate of Speedy Trial. Even if the Act be construed as requiring "speedy trial", moreover, it does not require public trial; this clause in the Amendment demands both Speedy and Public Trial.

The Government cites the maxim "*nullum tempus occurrit regi*", Gov. Br. 17, as though such assertions of unlimited rights in the King were considered models to be followed rather than reflections of the tyranny from which the Framers intended to insulate the new nation they had formed. It is pertinent that in fact the full maxim is "*nullum tempus* aut locus *occurrit regi*," Jowitt, *The Dictionary of English Law* 1252 (1959); and the antagonism of the Framers of the Sixth Amendment to the concept that the King could proceed in any place is evidenced by that Amendment's guarantee of "the right to speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law," patently demonstrating the rejection of the concept that the Government

mon law concept of fair trial according to the decisions on unreasonable and unjustified prosecutorial delays, see pp. 13-15, *supra,* enforced a right of the accused to obtain dismissal of criminal actions brought against him only after such delays. Consequently, the most reasonable interpretation of the Speedy Trial language of the Sixth Amendment is that it was intended to require all reasonable speed prior as well as subsequent to indictment.[21] There is every reason to conclude that

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could prosecute at any place whatsoever. Identically, the Framers did not intend to permit the Government to initiate formal prosecution at any time it elected.

If there is any Latin maxim that is pertinent to the "*tempus*" portion of the maxim cited by the Government, it is one of insistence on reasonably prompt action, "*accusator post rationabile tempus non est audiendus, nisi se bene de omissione excusaverit.*" Jowitt, *The Dictionary of English Law* 34 (1959). While it is true that this "maxim is not of general application in English law", the point is that it was "cited in the Star Chamber upon the hearing of a charge against sundry persons who were charged with conspiring to bring a charge of murder sixteen years after the death of the man alleged to have been murdered (*Sir Anthony Ashley's Case* (1612) Moore 816)." *Ibid.* Certainly the Framers of the Sixth Amendment were dedicated to proscribing the procedures followed in obtaining convictions in the Star Chamber. The Public Trial Clause is an unmistakable reflection of this major purpose. See *In Re Oliver,* 333 U.S. 257, 266-272 (1948).

[21] The facts and considerations demonstrated in this Brief have evidently not been considered by the lower Court decisions which have sought to restrict the applicability of the Sixth Amendment to the post-indictment period; *cf. Dickey v. Florida,* 398 U.S. 30, 39 (1970) (concurring opinion). See, e.g., *Nickens* v. *United States,* 323 F.2d 808 (D.C.Cir. 1963), *cert. denied,* 379 U.S. 905 (1964); *Kroll* v. *United States* 433 F.2d 1282 (5th Cir. 1970), *cert. denied,* 402 U.S. 944 (1971); *Hoopengarner* v. *United States,* 270 F.2d 465 (6th Cir. 1959); *United States* v. *Panczo,* 367 F.2d 737 (7th Cir. 1966); *Terlikowski v. United States;* 379 F.2d 501 (8th Cir. 1967); *Benson* v. *United States,* 402 F.2d 576 (9th Cir. 1968);

those who adopted the Bill of Rights had that same innate sense of justice which impelled the English common law judges to condemn unreasonable and unjustified pre-indictment delays.

CONCLUSION

The Constitutional imperatives of fair trial, Due Process and Speedy Trial, and the values and policies which they embody of the integrity and effectiveness of the administration of criminal law and the preservation of fundamental individual rights, compel judicial preclusion of unreasonable and unjustified delays in prosecutorial actions, prior as well as subsequent to the formal commencement of the criminal action. Accordingly, for the reasons set out in the Briefs for Appellees

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United States v. *Reed*, 413 F.2d 338 (10th Cir. 1969), *cert. denied sub nom. Sartain* v. *United States*, 397 U.S. 954 (1970).

But see, Petition of Provoo, 17 F.R.D. 183 (D.Md. 1955), *aff'd sub nom. United States* v. *Provoo*, 350 U.S. 857 (1955); *United States* v. *Wahrer*, 319 F. Supp. 585 (D. Alaska 1970); *United States* v. *Kojima*, 3 Hawaii Fed. 381 (1909); see also *Mann* v. *United States*, 304 F.2d 394, 396-397, n. 4 (D.C.Cir. 1962); *Schlinsky* v. *United States*, 379 F.2d 735 (1st Cir. 1967); *United States* v. *Feinberg*, 383 F.2d 60 (2d Cir. 1967); *United States* v. *Sanchez*, 361 F.2d 824 (2d Cir. 1966); *United States* v. *Dickerson*, 347 F.2d 783 (2d Cir. 1965); *United States* v. *Simmons*, 338 F.2d 804 (2d Cir. 1964), *cert. denied*, 380 U.S. 983 (1965); *United States* v. *Harbin*, 377 F.2d 78 (4th Cir. 1967); *Lucas* v. *United States*, 363 F.2d 500 (9th Cir. 1966); *Sanchez* v. *United States*, 341 F.2d 225 (9th Cir. 1965), *cert. denied*, 382 U.S. 856 (1965); *Acree* v. *United States*, 418 F.2d 427 (10th Cir. 1969); *United States* v. *Reed*, 285 F. Supp. 738 (D.D.C. 1968); *United States* v. *Parrott*, 248 F. Supp. 196 (D.D.C. 1965); *United States* v. *Miller*, 259 F. Supp. 294 (E.D.Pa. 1966); *United States* v. *Hunter Pharmacy, Inc.*, 213 F. Supp. 323 (S.D.N.Y. 1963); *Jones* v. *Superior Court of Los Angeles County*, 3 Cal.3d 734, 91 Cal. Rptr. 578 (1971).

and in this Brief, the judgment below, dismissing the indictment herein, should be affirmed.

Respectfully submitted,

ALAN Y. COLE
1730 K Street, N.W.
Washington, D.C. 20006
Attorney for the
National Association of
Criminal Defense Lawyers

Of Counsel:

ISAAC N. GRONER
ALEXANDER YOUNGER
COLE AND GRONER
1730 K Street, N.W.
Washington, D.C. 20006

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 1 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 70-19

UNITED STATES OF AMERICA,
Appellant,

v.

WILLIAM R. MARION AND SAMUEL C. CRATCH,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE SAMUEL C. CRATCH

BENJAMIN WRIGHT COTTEN
1314 Nineteenth Street
Washington, D.C. 20036
Attorney for Appellee
Samuel C. Cratch

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INDEX

	Page
QUESTIONS PRESENTED	1
COUNTERSTATEMENT	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. The ruling of the District Judge may not be appealed directly to this Court	
The order granting appellee's Motion to Dismiss the indictment did not sustain a "Motion in Bar" under former Title 18, U.S.C., § 3731	2
II. The District Judge properly exercised his discretion in dismissing the indictment for unnecessary delay in presenting the charge to a grand jury	
The accusations of crime and the identity of the accused were common knowledge in the community, and the defendant's records in the possession of the Government, several years before the indictment was filed	3
III. The Sixth Amendment right to speedy trial should attach and obtain throughout the continum of criminal law enforcement from offense to completion of punishment	
An accused should be tried, subject to the requirements of ordered expedition, within a reasonable time after the Government discovers, or should have discovered in the exercise of due diligence, that a crime has been committed by him	5
CONCLUSION	7

CITATIONS

Cases:

Dickey v. Florida, 398 U.S. 30 (1970)	5, 7
Escobedo v. Illinois, 378 U.S. 478 (1964)	5

United States v. Ewell, 383 U.S. 116 (1966) 6

United States v. Weller, 401 U.S. 254 (1971) 2

Constitution, Statutes and Treatise:

Constitution of the United States Sixth Amendment 5, 6

State of Federal Judiciary, Remarks of Chief Justice Warren E. Burger, ABA convention, St. Louis, August 10, 1970 7

18 U.S.C., § 3731 2

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BRIEF FOR APPELLEE SAMUEL C. CRATCH

QUESTIONS PRESENTED

The appellee Samuel C. Cratch adopts the Government's statement of Question 1 and the appellee Marion's restatement of Questions 2 through 4.

COUNTERSTATEMENT

The appellee Samuel C. Cratch adopts the Counterstatement as made by the appellee William R. Marion.